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No. 10-1051

In The Supreme Court of The United States

CHIPOTLE MEXICAN GRILL, INC.,
Petitioner,

v.

MAURIZIO ANTONINETTI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari should be granted where the court of appeals did not decide either of the Questions Presented by petitioner, where the case may be mooted, and where one question seeks a ruling on standards for an injunction, in the absence of any injunction below.

2. Whether, under *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), a court may issue an injunction without application of the four-factor test, where the statute provides for mandatory injunctive relief to remedy its violation.

3. Whether a plaintiff with disabilities, a customer in a fast food restaurant, has Article III standing under Title III of the Americans with Disabilities Act, when it is uncontested that the restaurant violated the ADA, he lives close by, would return "tomorrow," and he has been harmed and deterred from returning by continuing ADA violations.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

INTRODUCTION 2

STATEMENT 6

REASONS FOR DENYING THE PETITION 12

I. The Court of Appeals Did Not Decide Either of the Questions Presented 12

A. Standards for an Injunction 12

B. The *Lujan* Question 13

II. The Question on Injunction Standards Is Not Ripe for Decision 14

A. A Decision on Standards for Issuance of an Injunction Would be Premature Because Changed Circumstances May Have Mooted that Issue 14

B. In the Absence of an Injunction to Review, the Court Is Called Upon to Issue an Advisory Opinion 15

III. There Is No Conflict Among the Circuits On When an Injunction Must Issue to Remedy a Statutory Violation 16

A. No Court of Appeals Has Recognized Any Conflict Among the Circuits 16

B. *Weinberger v. Romero-Barcelo* Sets Forth the Longstanding Test, One on Which There Is No Inter-circuit Conflict 17

C. The Courts Below Uniformly Follow the *Romero-Barcelo* Test 20

D. Resolution of the Alleged Conflict in Chipotle's Favor Would Confuse the Courts Below and Upset Congressional Decision-making 24

E. The Remand for an "Appropriate Injunction" Was Correct 25

IV. There Is No Conflict Between the Court of Appeals Decision and *Lujan v. Defenders of Wildlife* 27

A. Congress Intended Private Enforcement of Title III of the ADA to Redress Discrimination by Individuals Who Have Been Harmed by Its Violation or Who Have Been Deterred from Seeking Access 27

B. Plaintiff Has Standing Under *Lujan* 31

C. The *Lujan* Issue Is Not Important 34

CONCLUSION 35

Appendix:
District Court Order of November 29, 2010 .....1a

TABLE OF AUTHORITIES

Cases

Access for America, Inc. v. Associated Out-Door Clubs, Inc., 188 F.Appx. 818 (11th Cir. 2006) 33

Armstrong v. Turner Indus., 141 F.3d 554 (5th Cir. 1998) 35

Atchison, T. & S. F. Ry. Co. v. Lennen, 640 F.2d 255 (10th Cir. 1981) 22

Bedrossian v. Northwestern Memorial Hosp., 409 F.3d 840 (7th Cir. 2005) 20, 21, 24

Bercovitch v. Baldwin School, 133 F.3d 141 (1st Cir. 1998) 23

Burlington N. R.R. v. Department of Revenue, 934 F.2d 1064 (9th Cir. 1991) 22

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 31

Clackamas Gastroenterology Associates, P. C. v. Wells, 538 U.S. 440 (2003) 29

CSX Transp. Inc. v. Tennessee State Bd. of Equalization, 964 F.2d 548 (6th Cir. 1992) 22

Doe v. National Bd. of Med. Exam'rs, 199 F.3d 146 (3d Cir. 1999) 23

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006) 18

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 5, 32

Government of Virgin Islands, Dep't of Conservation and Cultural Affairs v. Virgin Islands Paving, Inc., 714 F.2d 283 (3d Cir. 1983) 22

Gresham v. Windrush Partners, Ltd.,
730 F.2d 1417 (11th Cir. 1984) 23

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 34

Hohlbein v. Hospitality Ventures LLC,
248 Fed. Appx. 804 (9th Cir. 2007) 32

Hoosier Envtl. Council v. United States DOT,
2007 U.S. Dist. LEXIS 90804 (S.D. Ind.,
Dec. 10, 2007) 18

Huntington v. Marsh, 859 F.2d 1134
(2d Cir. 1988) 21

Illinois Bell Telephone Co. v. Illinois Commerce Commission, 740 F.2d 566 (7th Cir. 1984) 20

Kyles v. J.K. Guardian Sec. Servs.,
222 F.3d 289 (7th Cir. 2000) 34

Long v. Coast Resorts, Inc., 267 F.3d 918 (9th Cir. 2001) 4, 30

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) ..... *passim*

Muffley v. Spartan Mining Co., 570 F.3d 534 (4th Cir. 2009) 21

Natural Resources Defense Council v. Texaco Ref. & Marketing, 906 F.2d 934 (3d Cir. 1990) 21, 24

Rothberg v. Law Sch. Admission Council, 102 Fed. Appx. 122 (10th Cir. 2004) 5

Sharp v. Parents in Community Action, Inc., 172 F.3d 1034 (8th Cir. 1999) 21

Shaver v. Indep. Stave Co., 350 F.3d 716 (8th Cir. 2003) 34-35

Silver Sage Partners, LTD v. City of Desert Hot Springs, 251 F.3d 814 (9th Cir. 2001) 23

Small v. Dellis, 1997 U.S. Dist. LEXIS 23611 (D. Md. Dec. 18, 1997), *aff'd*, 2000 U.S. App. LEXIS 7739 (4th Cir., Apr. 25, 2000) (unpublished) 30-31

Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005) 29

Steger v. Franco, Inc. 228 F.3d 889
(8th Cir. 2000) 33

Tandy v. City of Wichita, 380 F. 1277
(10th Cir. 2004) 33, 34

Tennessee v. Lane, 541 U.S. 509 (2004)..... 28-29

Tennessee Valley Auth. v. Hill,
437 U.S. 153 (1978) 18, 19

Trailer Train Co. v. State Bd. of Equalization,
697 F.2d 860 (9th Cir. 1983) 22

United States Postal Service v. Beamish,
466 F.2d 804 (3d Cir. 1972) 22

United States v. Marine Shale Processors,
81 F.3d 1329 (5th Cir. 1996) 24

United States v. Microsoft Corp.,
147 F.3d 935 (D.C. Cir. 1998) 16, 17, 20

United States v. San Francisco,
310 U.S. 16 (1940) 19

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) .....*passim*

Constitution

Article III, United States Constitution .....*passim*

Statutes and Regulations

28 C.F.R. § 36.401(c) 26

28 C.F.R. § 36.406(a) 26, 30-31

28 C.F.R. § 36.501 26

28 C.F.R. App. B 26

39 U.S.C. § 3005 22

42 U.S.C. § 12101(a)(2), (5) 28

42 U.S.C. § 12101(b) 26

42 U.S.C. § 12183(a) 30

42 U.S.C. § 12188 ..... 26, 30, 33

Legislative History

H.R. Rep. 101-485, pt. 2 (1990) 30

H.R. Rep. 101-485, pt. 3 (1990) 30

H.R. Rep. 101-485, pt. 4 (1990) 27

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
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BRIEF IN OPPOSITION

Respondent Maurizio Antoninetti respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals opinion of July 26, 2010, as amended by the September 22, 2010 order on petition for rehearing, is at 1a-20a. The September

22, 2010 order is reported at 2010 U.S. App. LEXIS 19923.

Chipotle provides the citation as 614 F.3d 971, which is to the original July 26, 2010 opinion, which is at Pet. 21a-39a.

Subsequent to the decision of the court of appeals, the district court held a hearing and on November 29, 2010 issued an unreported order relevant to these proceedings. It is attached to this Brief at 1a.

INTRODUCTION

This lawsuit is controlled by its facts, including a factual stipulation dispositive on a crucial issue. The court of appeals did not decide either of the two questions presented, and there is no conflict among the circuits on either question.

Chipotle Grill. Inc. operates fast food restaurants which trumpet the "Chipotle Experience." Instead of simply receiving food prepared like other restaurants in its category, Chipotle customers move along the service line, and view, select and choose among a variety of attractively displayed fresh ingredients, which are then custom-assembled under the customer's scrutiny before the meal is paid for and received. Eye-catching appearance of bins of prospective ingredients is a key element of the Chipotle Experience; for example, chicken must have "dark caramel grill lines" and rice must be "bright white, visually fresh, with vibrant green cilantro." Food is prepared in open kitchens designed by Chipotle to be a "feast for the eyes."

Chipotle constructed the two restaurants in question in 2002, years after the 1993 national deadline for compliance with the architectural requirements of the Americans with Disabilities Act, and chose to construct a wall 44 inches high between the customer and the food being custom-assembled for customers. Customers who use wheelchairs are unable to see or to choose the ingredients as non-disabled customers can, and they cannot see into the food preparation and open kitchen promoted as key components of the restaurant's allure.

Antoninetti, who uses a wheelchair for mobility, was repeatedly denied by Chipotle the opportunity to be served in the same manner as non-disabled customers. Chipotle literally walled him off from the "Chipotle Experience."

The district court found Chipotle liable for violation of Title III of the ADA which forbids public accommodations from discriminating against people with disabilities, and liable for violating a state law which incorporates the ADA. The court awarded damages. An injunction was denied. On appeal, the court held that Chipotle's walls violated the ADA, and that Antoninetti was entitled to an injunction and, potentially, additional damages. It held that Chipotle's walls violated the ADA and that Antoninetti was entitled to an in

Chipotle raises two questions which were not decided by the court of appeals. That court specifically refrained from deciding the first

question.[1] The second question was not raised by Chipotle in the court of appeals prior to the court of appeals panel decision; the issue was then raised in Chipotle's petition for rehearing but was not decided by the court of appeals.[2]

On the question of standards for an injunction, the petition essentially seeks interlocutory review; no injunction was issued by the district court. The court of appeals reversed and remanded for the district court to formulate an injunction in the first instance. The district court has since indicated that no injunction may be necessary.

There is no conflict among the circuits on the touchstones for issuance of an injunction when a statute has been violated. The circuits uniformly apply *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and its progeny, which require consideration of each statute's objectives and text, and the circumstances of the case, to determine whether the four-factor criteria apply, or whether the statute requires a mandatory injunction against its violation. As to Title III of the Americans with Disabilities Act, there are no decisions of any court of appeals in conflict on this question.[3]

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[1] Chipotle's first question is: "Whether a statute's express provision for injunctive relief reduces or eliminates a plaintiff's burden of meeting the traditional criteria for injunctive relief?"

[2] Chipotle's second question is essentially whether the decision below conflicts with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

[3] Only two circuits have mentioned the issue, and both refrained from deciding it. One is the Ninth Circuit in the case at bar and in *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th

On the standing question under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), even if it had been properly raised and decided below, which it was not, there is no conflict alleged or existent among the circuits. Antoninetti's uncontradicted testimony that he would return to the restaurants "tomorrow," that he lives nearby, together with the parties' stipulation that he wants to return to the restaurants,[4] make the facts in this case a far cry from the "some day intentions" in *Lujan*, as explicated in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), the latter of which is not cited by Chipotle.

Essentially attacking the national objectives of the Americans with Disabilities Act, Chipotle urges review on certiorari, imposing a weight the case cannot bear:

- Chipotle raises the specter of "automatic, financially-crippling facilities-modification order[s]." Pet. at 23. Here, however, Chipotle explicitly waived any defense of cost to comply with the ADA. Chipotle is in no position to complain about being required to do what it was required to do years earlier.

Cir. Nev. 2001). The other is the Tenth Circuit's decision in an ADA testing case, *Rothberg v. Law Sch. Admission Council*, 102 Fed. Appx. 122, 125 (10th Cir. Colo. 2004).

[4] With regard to intention to return to Chipotle, the court of appeals found that the parties' stipulation is "inconsistent with and totally undermined" the district court's conclusion otherwise. Pet. at 2a. The district court did not mention the stipulation in its findings of fact, although the stipulation contradicted its conclusions.

- Chipotle seeks to undermine efforts of people with disabilities to enforce removal of architectural barriers to access to public accommodations. Chipotle's critique of Antoninetti for having filed other ADA litigation is unjustified by, and is irrelevant to, the issues in this case. With regard to litigation by others, the appropriateness of the use of testers in civil rights litigation is well established, and is no bar to injunctive relief to remedy violations of the ADA.

STATEMENT[5]

Chipotle operates a chain of fast food restaurants, including locations in San Diego/Pacific Beach and Encinitas, California, which are "new construction" as defined by the ADA.[6] Chipotle distinguishes itself from other fast food chains by providing its customers with the interactive "Chipotle Experience," which includes having customers participate as their food is being made.[7] Customers

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[5] Rather than submit a restatement of all the proceedings before the district court, Antoninetti integrates in this abbreviated statement correction of a number of omissions and misstatements in the Petition.

[6] District Court Findings of Fact (hereafter "FF") 1, 4-7, Pet. 44a.

[7] CR 92 / ER II-15, p. 86 (59:23-60:12), 148:23-149:5; CR 157 / ER I-7, Fact 45. References are to the record excerpts in the court of appeals and to the district court record. "CR" refers to the item at the District Court Record Docket Number. "ER" refers to "Appellant's Excerpts of Record" in the court of appeals, with the volume and item number. "SER" to the "Supplemental Excerpts of Record."

get to "see, select and direct" to customize their food so that they receive their "perfect burrito."[8]

Customers can see the portion sizes placed on their entrees and can tell staff if they want more or less of an ingredient.[9] Chipotle knows its customers "love to interact" and "watch closely as we put their meal together."[10] Chipotle wants its customers to "eat with their eyes,"[11] and it provides "the WOW factor" which is, among other things, the "right before their eyes" element.[12]

During the interactive ordering process, customers see sixteen large bins of food and can compare different food options, such as the various meat selections.[13] They can decide which of the

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[8] CR 92 / ER II-15, 106:5-12, 109:18-23, 130-134; CR 157 / ER I-7, Facts 18, 19, 26, 27; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, pgs. 3, 6, 10, 21, 22, 23; CR 92 / ER II-15, 114:24-115:24; CR 157 / ER I-7, Fact 19; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, p.1; CR 92 / ER II-15, p. 73 (137:12-22), p. 87 (114:17-23), 94, 95, 106:55-12, 110:13-111:3, 130, 145:11-14; CR 157 / ER I-7, Facts 17 to 27; CR 268 / ER VII-28, 647:11-650:3; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 1, 2, 3, 6, 21, 22, 23.

[9] CR 92 / ER II-15, p. 87 (114:17-23), 95; CR 157 / ER I-7, Facts 26, 27; CR 267 / ER IV-25, 57:1-7, 58:-321, 91:5-23.

[10] CR 92 / ER II-15, 115:20-24, 132; CR 265 / ER IV-25, 62:14-16, 309:24-310:2; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 3.

[11] CR 92 / ER II-15, 115:25-116:2, 132, 133; CR 229 / ER I-3, Fact 57.

[12] CR 92 / ER II-15, 121:8-122:4; CR 157 / ER I-7, Fact No. 25; CR 268 / ER VII-28, 647:11-650:3; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 6.

[13] CR 92 / ER II-15, DVDs at 205, 206, 207; CR 265 / ER IV-25, 61:19-63:14, 64:3-8. 65:3-11, 67:20-23; CR 266 / ER V-26, 311:3-

ingredients is more visually appealing to them,[14] and they can determine the freshness of the food, such as whether or not the barbacoa is dry, or the beans have a crust on them.[15] Appearance of the food is so important that Chipotle mandates specific details for the "look" of its food.[16] For example, chicken must have dark caramel grill lines, and rice must be "bright white, visually fresh, with vibrant green cilantro."[17]

Chipotle specifically designed its restaurants so that customers can see into the open kitchen and can see freshly marinated meats being grilled.[18] The open kitchens are designed to be a "feast for the eyes" and are intended "to bring customers more completely into the dining experience."[19] This is because "customers eat with their eyes."[20]

23; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, 18, 19, 20, 21, 22, 23.

[14] CR 92 / ER II-15, DVDs at 205, 206, 207; CR 265 / ER IV-25, 61:19-63:14, 64:3-8. 65:3-11, 67:20-23; CR 266 / ER V-26, 311:3-23; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, 18, 19, 20, 21, 22, 23.

[15] CR 92 / ER II-15, 146:22-147:15, 155:1-21; CR 265 / ER IV-25, 67:24-68:1, 68:23-25.

[16] CR 92 / ER II-15, 132, 133; CR 229 / ER I-1, FF3; CR 265 / ER IV-25, 68:19-69:5; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 3, 5.

[17] FF #3; Pet. 43a.

[18] CR 92 / ER II-15, 131; CR 266 / ER V-26, 311:8-11; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 2.

[19] CR 92 / ER II-15, 131; CR 157 / ER I-7, Fact 23; CR 265 / ER IV-25, 141:19-22; CR 266 / ER V-26, 308:2-12; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 2.

[20] FF #57 and 58; Pet. 54a-55a.

During his multiple visits to the two restaurants, Antoninetti could not see over the wall obstructing the view to the food preparation area.[21] His experience was quite different from that of non-disabled customers, in addition to being unable to experience the interactive and visual process. The accommodations were not helpful and he was not satisfied with the service he received.[22] He could not see how much of an ingredient was actually placed on his burrito and was never told the portion size of any ingredients that were actually being placed on his burrito.[23]

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[21] FF #40. 45-47; 54a-55a.

[22] Contrary to Petitioner's Statement, Antoninetti did not believe or admit that the accommodations provided him were acceptable. Chipotle's citations are to an employee's testimony, not Antoninetti's. His testimony was otherwise. The employee admitted on cross-examination that she simply guessed what Antoninetti meant when he nodded his head or said "okay" while she served him. She did not know, nor did she ask, if he meant that he could simply see the sample of food shown to him as opposed to being satisfied with the method of accommodation. ER VII-28, 613:18-614:16. In fact, Antoninetti's nod simply meant that he would take the ingredient shown to him. ER VI-27, 397:1-19.

When asked if seeing the sample cups of food helped him, Antoninetti said: "If I knew the quantity, the standard quantity, that would be an improvement." He also testified that he "did not know" if the quantity in the soufflé (sample) cups was the standard quantity per serving. CR 267 / ER VI-27, 463:16-24.

[23] CR 267 / ER VI-27, 399:15-400:3, 402:12-21, 403:9-11, 404:2-13, 410:22- 411:7. Ms. Arriaga, admitted that she never told Antoninetti that the amount of an ingredient she was showing him was the amount she actually placed on his burrito. CR 268 / ER VII-28, 612: 20-23.

Before and after filing his lawsuit, Antoninetti visited the Pacific Beach Chipotle at least six times and the Encinitas Chipotle two times.[24] The parties stipulated that Antoninetti wants to be able to have the "Chipotle Experience" - to see all of the wonderful, tasty ingredients on display, to see his burrito assembled and rolled, to make his "perfect burrito," quickly.[25]

Antoninetti would return to Chipotle's restaurants "tomorrow" if the walls were lowered and he had the chance to see the display and presentation that Chipotle provides to standing customers.[26] He has been deterred from returning to the restaurants since October 6, 2006 because the "accommodations" provided during the litigation-conducted site inspections were not appetizing or appealing and the experience was awkward and humiliating. If he returned, he would face the same issues.[27]

Years before Antoninetti filed his lawsuit, Chipotle had received numerous complaints from customers in wheelchairs about the inaccessibility of the food viewing areas at its restaurants. The complaints were that the height of the walls obstructed the view of the food preparation area for people in wheelchairs.[28]

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[24] CR 89 / ER II-13, p.7, par. 24; CR 229 / ER I-3, FF 128, 129, 130, 131, CL14.

[25] CR 89 / ER II-13, p. 7, par. 24; CR 157 / ER I-7, Fact 41.

[26] CR 267 / ER VI-27, 426:13-15.

[27] CR 89 / ER-13, 4:9-7:28; CR 267 / ER VI 27, 407:10-21, 412:23-413:25, 426:21- 427:10.

[28] CR 92 / ER II-15, p. 59 - 64.

Chipotle admitted that Antoninetti's requested injunctive relief could be accomplished without much cost or effort.[29] Chipotle offered no evidence, at any time, that it would be structurally impracticable to have designed and constructed its food preparation area without the offending wall.

From 1990 until the time he filed his Complaint against Chipotle in 2005, Antoninetti had filed suit against six different sites: two Dixieline stores, a Holiday Inn, the newly-remodeled Bertrand at Mr. A's restaurant, San Diego Pier Café restaurant and the newly-constructed Oceanside Mall. One of the sites, the Mall, was the subject of a number of additional cases against businesses inside the Mall, resulting in additional suits. While he initially visited the Mall as a potential ADA consultant for a law firm, Antoninetti asked to be a plaintiff in the Oceanside Mall cases because he was quite upset that a new mall was constructed with many blatant violations of the ADA. He hoped to deter other developers from constructing brand-new inaccessible facilities. [30] In each case, Antoninetti required defendants to remove architectural barriers as part of his settlements with them.[31]

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[29] CR 92 / ER II-15, p. 172, Response to Interrogatories 16 and 17; SER VIII-32.) Chipotle waived any defense that the requested injunctive relief was not readily achievable. (CR 92 / ER II-11.)

[30] CR 267 / ER VI-27, 505:3-14; 501:3-22.

[31] CR 267 / ER VI-27, 476:20-24.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals Did Not Decide Either of the Questions Presented.

The Court of Appeals did not decide either of the questions raised in the petition.

A. Standards for an Injunction

Chipotle's first question is one which the Court of Appeals emphatically and explicitly did not decide in this case. Pet. 15a-16a.[32]

The Court of Appeals continued to "refrain[ ] from deciding" the question. In view of its finding that the district court should on remand determine the contours of any injunction, the court of appeals refused to decide the question:

> In view of that conclusion and disposition, we need not address the question, which the parties vigorously dispute but which the district court did not decide, whether the Disabilities Act authorizes a district court to deny injunctive relief after finding a violation of the Act.

Pet. 35a.

Unwilling to accept the court of appeals avowal, Chipotle states: "The court of appeals *purported* to express no view as to whether Title III ever 'authorizes a district court to deny injunctive relief after finding a violation of the Act.'" Pet. at 12 (emphasis added).

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[32] The district court had applied the four-factor test which Chipotle advocates here. Pet. 85a-88a.

Chipotle's Question 1 not having been decided in the court of appeals, it is not one on which certiorari should be granted.

B. The *Lujan* Question

Belatedly, Chipotle seeks a ruling on whether Antoninetti has standing to obtain an injunction. Chipotle asserts that the decision below conflicts with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Prior to the panel decision on which certiorari is sought, the court of appeals was not requested to decide the *Lujan* question.[33] The courts below did not decide the *Lujan* question.

Chipotle raised this question for the first time in its *Petition for Panel Rehearing and Rehearing En Banc*, filed below August 16, 2010. The only question raised in that petition was the *Lujan* question. The petition was denied September 22, 2010, with no judge requesting a vote on the petition for rehearing *en banc*, and with no discussion of *Lujan*. Pet. at 2a.

Chipotle acknowledges that it failed to properly raise the question until its rehearing petition. Pet. at 28, n. 6. At note 6, Chipotle claims, however, that

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[33] Chipotle's *Opening and Response Brief of Appellee/Cross-Appellant* and its *Fourth Brief on Cross-Appeal Filed by Appellee-Cross-Appellant* do not cite *Lujan* or raise standing as an issue for decision. Similarly, Antoninetti's briefs before the court of appeals do not cite *Lujan*.

Chipotle's Fourth Brief, in a single phrase at page 35, submits that, if Chipotle is unsuccessful on the merits, there should be a remand "as to whether Antoninetti was denied access and therefore had standing." (Dkt 6829038 at 35 (Mar. 2, 2009)).

the court below "addressed the point" in its discussion under a different question. *Id.*, citing Pet. at 14a-15a. Even a quick glance at those pages reveals no discussion of standing at all.[34]

Certiorari should not be granted to review the question of possible conflict with *Lujan*, when that question is not decided below, and was not properly raised.

II. The Question on Injunction Standards Is Not Ripe for Decision.

A. A Decision on Standards for Issuance of an Injunction Would be Premature Because Changed Circumstances May Have Mooted that Issue.

Key circumstances have changed. The district court recently concluded that an injunction may not be necessary based on changed circumstances.

Subsequent to the decision before the court of appeals, Chipotle argued to the district court that this litigation is moot. Its counsel "represented that Chipotle has lowered food preparation counters to a height where wheelchair-bound customers can view the counter without obstruction. This modification has been made at all Chipotle restaurants in California, including the two restaurants at issue in this case." The order is attached to this brief at 1a (Order of November 29, 2010). Accordingly, "Defendant argues that these actions render moot

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[34] To the extent that there is even a bare allusion to the question, the court below resolves it based on the parties' fact stipulation. That fact-based decision is obviously inappropriate for review on certiorari.

the need to issue an injunction." *Id.* The district court suggested that an injunction may not be necessary:

> *Because an injunction is not necessarily the only means to accomplish this goal* [ensuring compliance with the ADA], limited discovery and briefing on this issue are appropriate.

Appendix below at 1a (emphasis added).[35]

At the hearing, Antoninetti's counsel advised the district court that Chipotle stated it wanted to be able to return to the original design, which Chipotle believed complied with the ADA.[36]

In light of the activity in the district court, and the possible mootness of the injunction issue, certiorari on that question would be inappropriate.[37]

B. In the Absence of an Injunction to Review, the Court Is Called Upon to Issue an Advisory Opinion.

Certiorari is also not warranted because the injunction issue presents only an abstract question of law and calls for an advisory opinion.

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[35] The district court set a schedule for discovery on mootness, a new summary judgment motion, with briefing ending May 13, 2011. App. 1a. (Order of November 29, 2010).

[36] This sentence, while not in the record, is provided for the Court's information because it bears on the question of possible mootness.

[37] The point here is on the prematurity of certiorari. Respondent does not waive his right to any argument, for or against mootness, in the district court, depending on the outcome of discovery and other factors.

The court of appeals did not determine the remedy to which Antoninetti was entitled. In finding that an "appropriate injunction" should be entered, the court expressed no view on the content of any relief. Instead, it deferred to the district court: "The precise contours of such an injunction are for the district court to determine in the first instance." Pet. 35a.

In the absence of an injunction, it is difficult, if not impossible, for this Court to measure all the circumstances against any standard to determine the validity of the non-existent "injunction."

III. There Is No Conflict Among the Circuits on When an Injunction Must Issue to Remedy a Statutory Violation.

A. No Court of Appeals Has Recognized Any Conflict Among the Circuits.

No court of appeals has recognized any inter-circuit conflict on the question of when an injunction must issue in the face of a federal statutory violation.

This case is governed by the test in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), as discussed below. Chipotle's statement that the "courts of appeals are well aware of the conflict" is supported solely by one disfigured quotation which omits the D.C. Circuit's critical phrase referencing *Romero-Barcelo*. *United States v. Microsoft Corp.*, 147 F.3d 935, 944 (D.C. Cir. 1998)

Chipotle's Pet. at 21-22	Complete Sentence from U.S. v. Microsoft Corp.
"some cases * * * took the view that mere statutory authorization of injunctive relief displaced equitable standards."	"Some cases *antedating Romero-Barcelo* took the view that mere statutory authorization of injunctive relief displaced equitable standards [citation omitted]"
(ellipsis in Petition, but not in the D.C. Cir. Decision)	(omitted phrase included and emphasized)

The omission of the reference to *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982), is significant because a proper understanding of that case demonstrates that there is no conflict among the circuits, as we now show.

B. *Weinberger v. Romero-Barcelo* Sets Forth the Longstanding Test, One on Which There Is No Inter-circuit Conflict.

Where courts consider issuance of an injunction in connection with violation of a statute, the legal standard is clear and long-established by this Court. Each of the cases which Chipotle cites to support its inter-circuit conflict simply adheres to that standard, or pre-dates the modern enunciation of the test. There is no conflict.

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-14 (1982), the Court set forth the test for determining whether and when Congress has limited the court's discretion by enacting a statute which requires an injunction as a remedy for violation of the statute. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." 456 U.S. at 313. If Congress does not restrict the court's equitable jurisdiction by statute, the four-factor test is applied.

Chipotle here ignores this important aspect of the *Romero-Barcelo* standard. *Romero-Barcelo* held that a statute may "require[ ] the District Court to enjoin" certain actions, citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).[38] Courts must look to [t]he purpose and language of the statute," and "not the bare fact of a statutory violation." 456 U.S. at 313-314. Where "only an injunction could vindicate the objectives of the Act," 456 U.S. at 314, the statutory violation merits an injunction, without application of the traditional four-factor balancing test.[39]

As Chief Justice Burger famously described the limitations on judicial power:

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[38] The statute in question was superseded after *Tennessee Valley*. *See Hoosier Envtl. Council v. United States DOT*, 2007 U.S. Dist. LEXIS 90840 (S.D. Ind. Dec. 10, 2007).

[39] *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) ("Nothing in the Patent Act indicates that Congress intended such a departure."). The majority and two concurring opinions of the Court in *ebay* discuss the jurisprudential considerations which underlie the Romero-Barcelo rule.

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 195 (1978).

The test referenced in *TVA* and further crafted in *Romero-Barcelo* is the one which Chipotle seeks to overturn. The test is not new. *United States v. San Francisco*, 310 U.S. 16, 31 (1940) (affirming grant of an injunction upholding a statute requiring San Francisco to distribute electric power publicly as a condition of a grant of federal land and rights; held that an injunction was required without a "balancing of equities" or "invocation of the generalities of judicial maxims." Violation of the statute alone required the injunction).

Decisions applying *Romero-Barcelo* examine each statute and apply its test to the typically fact-intensive circumstances in the particular case, together with the language and objectives of the statute.[40]

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[40] In *Romero-Barcelo* itself, the Court found that the Federal Water Pollution Control Act did not require an injunction against navy discharge of ordinance around Puerto Rico. 456 U.S. at 317-18.

The D.C. Circuit explained that "if a statute confers a *right* to an injunction once a certain showing is made, no plaintiff . . . need show no more than the statute specifies." *United States v. Microsoft Corp.*, 147 F.3d 935, 943 (D.C. Cir. 1998) (emphasis in original). The Seventh Circuit summarized the rule in *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 740 F.2d 566. 571 (7th Cir. 1984):

> Under traditional principles of equity, to receive a preliminary injunction a plaintiff must prove that it will suffer irreparable harm if the injunction is denied. However, where the plaintiff seeks an injunction to prevent the violation of a federal statute that specifically provides for injunctive relief, it need not show irreparable harm.

740 F.2d at 571. A case Chipotle cites to support its position, *Bedrossian*, actually agrees with Antoninetti's position that statutory "shall" language may eliminate the need for the traditional analysis. *Bedrossian v. Northwestern Memorial Hosp.*, 409 F.3d 840, 843 n. 1 (7th Cir. 2005).

C. The Courts Below Uniformly Follow the *Romero-Barcelo* Test.

The petition constructs a false dichotomy, classifying some courts of appeals as (rightly) applying the traditional four-part test to injunctions when a statute is violated, and other courts of appeals as (wrongly) granting injunctions automatically in that circumstance. Only by ignoring the robust *Romero-Barcelo* test does Chipotle create this non-existent dichotomy and,

thereby, assert an inter-circuit conflict where none exists.

In actuality, the cases fall around the line established in *Romero-Barcelo*. Generally, the traditional four-part test is applied, but where the objectives and language of the statute in question call for an injunction, there is no need to apply the traditional test.

All the cases cited in the petition as being on one side of the false dichotomy are actually decisions which, consistent with *Romero-Barcelo*, found that there was no right to an injunction under the particular statute, and therefore the traditional equitable balancing test is applied. *Huntington v. Marsh*, 859 F.2d 1134, 1143 (2d Cir. 1988) (Ocean Dumping Act provides for "such relief as to the equities of the case may require."); *Natural Resources Defense Council v. Texaco Ref. & Marketing*, 906 F.2d 934, 937 (3d Cir. 1990) (no statutory mandate for injunction); *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 542 (4th Cir. 2009) (NLRA; the traditional four-part equitable test should govern what relief is statutorily 'just and proper.'"); *Bedrossian v. Northwestern Memorial Hosp.*, 409 F.3d 840, 843 n. 1 (7th Cir. 2005) (Uniformed Services Employment and Reemployment Rights Act; the "the court may use its full equity powers"); *Sharp v. Parents in Community Action, Inc.*, 172 F.3d 1034, 1038 (8th Cir. 1999) (labor injunction under NLRA; no dispute on the issue. "Thus, the Board properly concedes that the reference to "just and proper" in § 10(j) incorporates traditional equitable principles.").

Not one of the above decisions reference or demonstrate any conflict with other circuits, either generally or on the particular statutes involved.

Where statutes examined under *Romero-Barcelo* call for a "non-traditional" standard for an injunction, the courts of appeals – consistent with the test under that decision – depart from the traditional standard. *E.g., United States Postal Service v. Beamish*, 466 F.2d 804 (3d Cir. 1972) (postal service law; injunction to be entered where statute provided "the United States district court . . . shall . . . upon a showing of probable cause to believe . . . [that 39 U.S.C. § 3005] is being violated"); *Government of Virgin Islands, Dep't of Conservation and Cultural Affairs v. Virgin Islands Paving, Inc.*, 714 F.2d 283 (3d Cir. 1983) (the Virgin Islands Coastal Zone Management Act of 1978, provided for preliminary injunctive relief upon a "prima facie showing of a violation.").

Thus, four of the cases Chipotle critiques for not applying the four-factor test involve injunctions under the terms of the Railroad Revitalization and Regulatory Reform Act of 1976 which specifically authorizes injunctive relief to prevent violations of the act, with the chief case one which pre-dated *Romero-Barcelo*.[41] The other two cases authorized

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[41] *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255, 258 (10th Cir. 1981); *CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, 964 F.2d 548, 550 (6th Cir. 1992); *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983) (Railroad Revitalization and Regulatory Reform Act of 1976 "specifically authorizes a district court to grant injunctive relief to prevent a violation of the statute."); *Burlington N. R.R. v. Department of Revenue*, 934 F.2d 1064, 1075 (9th Cir. 1991)

injunctions in civil rights cases where the statute, the Fair Housing Act, was found to "prohibit certain discriminatory practices without regard to their actual effect on the community" and to require an injunction.[42] There is no conflict among these cases; each is consistent with *Romero-Barcelo*.

This suit arises under Title III of the Americans with Disabilities Act. Chipotle cites no cases in which any court of appeals issued a decision in conflict with any other court of appeals (or district court) on whether the statute here falls on either side of the *Romero-Barcelo* test.[43]

The applicable principles are not black-and-white. Even the so-called "traditional standards" permit

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(challenge to appointment of special master; injunction issue mentioned in *dicta*)

[42] *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) (in light of strong national policy against race discrimination in housing, where the Fair Housing Act prohibits certain practices without consideration of harm done by the practices, an unrebutted violation of the statute is sufficient to support an injunction remedying those violations.); *Silver Sage Partners, LTD v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (follows *Gresham*; holds "where a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation.").

[43] The two ADA cases cited by Chipotle do not analyze, discuss or involve the question of standards for an injunction when a statute is violated. *See Bercovitch v. Baldwin School*, 133 F.3d 141, 151 (1st Cir. 1998) (no discussion of injunction standards; issue was a preliminary injunction to preserve the *status quo* re disruptive student pending arbitration); *Doe v. National Bd. of Med. Examiners*, 199 F.3d 146, 154 (3d Cir. 1999) (no discussion of injunction standards; issue was flagging of test scores of disabled student in graduate school testing reports).

injunctions without findings of irreparable harm and other elements which are balanced under those standards. *See*, for example, *United States v. Marine Shale Processors*, 81 F.3d 1329, 1358 (5th Cir. 1996) ("Weinberger and Amoco allow a court to issue an injunction without making findings of irreparable harm, inadequacy of legal remedy, or the balance of convenience, provided that traditional equitable principles permit such a course of action.").[44]

As *Marine Shale* indicates, the need to balance the elements of a four-factor test, by definition, will sometimes highlight the objectives and language of the relevant statute in determining the need, or the right to, an injunction. Indeed, in the case at bar, the court of appeals specifically referenced both the statute and the case-specific "circumstances" in making its determination.

D. Resolution of the Alleged Conflict in Chipotle's Favor Would Confuse the Courts Below and Upset Congressional Decision-making.

We have shown that there is no conflict among the circuits. If the Court adopted Chipotle's proposed rule that the four-part traditional test is always required for an injunction when a statute is violated, then *Romero-Barcelo* and its progeny would be overturned with unpredictable consequences.

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[44] Note that cases Chipotle cites acknowledge that some statutes do require injunctive relief under *Romero Barcelo*, without satisfaction of the traditional standards. *Bedrossian, supra; Natural Resources Defense Council v. Texaco Ref. & Marketing, supra.*

Courts would be compelled to re-examine and reverse the careful statute-specific analyses they have undertaken under the Railroad Revitalization and Regulatory Reform Act, the Fair Housing Act, the Coastal Zone Management Act of 1978, and multiple other statutes in which Congress has seen fit to mandate or authorize injunctions.

Congress presently is guided by *Romero-Barcelo*. Congress knows that when it includes permissive injunctive relief, the traditional four-part test will apply. When Congress chooses to mandate injunctive relief, the traditional test will not apply. Accepting Chipotle's stark "one test fits all" rule would hamstring Congress and needlessly limit the legislature's acknowledged authority to delineate remedies for statutory violations.

Chipotle's argument not only contradicts the *Romero-Barcelo* line of cases but also would dangerously emasculate numerous cases involving other statutes in the business world, on railroad transportation, in labor law, in the civil rights context, and other fields. Courts would be forbidden to undertake any consideration of a statute's objectives and text when requested to grant an injunction against continuance of a proven violation. The law does not favor such a straightjacket rule.

E. The Remand for an "Appropriate Injunction" Was Correct.

In a case which properly raised the question under *Romero-Barcelo*, the Court would consider the objectives and language of the architectural requirements of Title III of the ADA, and its

implementing rules, and the circumstances of the case, and determine whether Congress intended violations to be strictly enforced by an injunction, without application of the four-factor test.

Here, however, there is no need to reach the question, as we have shown above. Noting that Title III provides no damages but only injunctive relief to a private plaintiff, and considering the here uncontested violation of the ADA, the court of appeals relied on the fact stipulation establishing irreparable harm to Antoninetti, and on "all the circumstances," to find an abuse of discretion in the district court's denial of an injunction.[45]

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[45] If the issue was reached, Antoninetti submits, first, that he has satisfied the four-factor test in any event. If he has not, he submits that Title III's provisions, as applicable here, require an injunction to remedy a statutory violation. The ADA's implementing regulations state that new construction *shall* comply with the standards for accessible design published as the ADAAG. 28 C.F.R. 36.406(a). Congress clearly stated that the purpose of the ADA is to provide a *mandate* for the elimination of discrimination against people with disabilities. 42 U.S.C. §12101(b). The only exception in new construction is when an entity can demonstrate that it is structurally impracticable to meet the standards for design and construction, limited to those "rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features." 28 C.F.R. 36.401(c).

The enforcement provision for private suits brought under Title III of the ADA is codified at 42 U.S.C. § 12188. The regulation implementing the enforcement provision for private suits is found at 28 C.F.R. 36.501, discussed in the ADA Regulations' Section-by-Section Analysis, 28 C.F.R., App. B, pages 638-639, which confirms that Congress intended to mandate an injunction whenever a violation of the ADA new construction standards occurs:

IV. There Is No Conflict Between the Court of Appeals Decision and *Lujan v. Defenders of Wildlife.*

A. Congress Intended Private Enforcement of Title III to Redress Discrimination by Individuals Who Have Been Harmed by Its Violation or Who Have Been Deterred from Seeking Access.

About 53 million people in the United States are disabled.[46] Millions of Americans have mobility disabilities. For people 15 and older, 3.3 million use a wheelchair, 10.2 million use an ambulatory aid

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The Report of the Energy and Commerce Committee notes that "an order to make a facility readily accessible to and usable by individuals is *mandatory under* this standard. H.R. Rep. No. 485, 101st Cong., 2d Sess, pt. 4 at 64 (1990).

The House Report cited in the commentary states that, when new construction rules are violated, "the issuance of an order to make a facility readily accessible to and usable by individuals is *mandatory*," although the courts retain equitable discretion "in framing the terms of the *mandatory* injunction," such as the period for compliance. H.R. Rep. No. 485, 101st Cong., 2d Sess, pt. 4 at 64 (1990).

[46] McNeil, J. (2001). Americans with disabilities. Current Population Reports: Household studies, no. 1997, available at http://www.census.gov/prod/2001pubs/p70-73.pdf. Using different definitions, the U.S. Census Bureau put the number at 41.2 million in a 2009 publication. U.S. Census Bureau News, "Americans with Disabilities Act: July 26" CB09-FF.13 (May 26, 2009) (Facts for Features), available at http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb09-ff13.html.

such as a cane, crutches or walker.[47] These numbers are increasing.[48]

In adopting the ADA, Congress recognized that ". . . discrimination against individuals with disabilities continue to be a serious and pervasive social problem," and that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, ... failure to make modifications to existing facilities and practices, ... [and] segregation." 42 U.S.C. § 12101(a)(2), (5). One of the purposes of the ADA is to provide authority on a national scale to the disabled community, a disenfranchised segment of our society that is often excluded from everyday life because of myriad barriers, to litigate to enforce its rights.

The Americans with Disabilities Act is designed "to provide a clear and comprehensive national mandate for the elimination of discrimination

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[47] U.S. Census Bureau News, "Americans with Disabilities Act: July 26" CB09-FF.13 (May 26, 2009) (Facts for Features). 1990 data estimated the number of wheelchair users at 1.4 million. Chart at Section 2.2, in Kraus, L., Stoddard, S., & Gilmartin, D. (1996). *Chartbook on Disability in the United States, 1996.* An InfoUse Report. Washington, DC: U.S. National Institute on Disability and Rehabilitation Research. On wheelchair use, *see* Kaye, H.S., Kang, T., and LaPlante, M.P. 2000. Mobility Device Use in the United States. Disability Statistics Report 14. Washington, DC: U.S. Department of Education, National Institute on Disability and Rehabilitation Research.

[48] By 2050, there will be 88.5 million Americans over 65, more than doubling the 38.7 million in 2008. U.S. Census Bureau News, An Older and More Diverse Nation by Midcentury, Aug. 14, 2008, http://www.census.gov/ newsroom/releases/ archives/population/cb08-123.html.

against individuals with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 516 (2004) (citation omitted); *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 446 (2003) ("[T]he statutory purpose of [the Americans with Disabilities Act of 1990 is] ridding the Nation of the evil of discrimination"). Title III's prohibition on discrimination in public accommodations includes requirements to "provide disabled individuals full and equal enjoyment" of the entity's services. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 128-129 (2005).

When drafting Title III of the ADA, Congress recognized that the additional costs for making new facilities accessible were often nonexistent or negligible, and concluded that there was no reason why new buildings could not be barrier-free. Committee Reports, 101 H. Rpt. 485, Part 2 (May 15, 1990), reprinted 1990 U.S.C.C.A.N. 303, 317-318. Congress also found that the lack of strong, specific, enforceable legislation requiring accessibility was a major impediment to accomplishing barrier free environments. *Id.* at 318. Based on these findings, Congress recognized a need to establish a clear and comprehensive federal prohibition of discrimination on the basis of disability in new public accommodations. *Op. cit.*, 1990 U.S.C.C.A.N. at 310, 399-404.

Ultimately, Congress required a higher standard in new construction and alterations than in existing facilities because

> [t]he ADA is geared to the future — its goal being that, over time, access will be the rule, rather than the exception. Thus, the bill only

> requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible.

Committee Reports, 101 H. Rpt. 485, Part 3 at 63 (May 15, 1990), reprinted 1990 U.S.C.C.A.N. 445, 486.

New construction and alterations must be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. §12183(a). The standard means

> access to the goods, services, and programs of the facility. For example, a new building should be designed so that a potential patron can get to a store, get into the store, and get to the areas where goods are being provided.

H.R. Rep. 101-485, pt. 3, at 63 (1990). It stated further that, the New Construction Standard "is intended to enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter, and use a facility." H.R. Rep. 101-485, pt. 2, at 117-18 (1990).

Congress thus intended that all new facilities be designed and constructed to be accessible to the disabled, and that all responsible entities who failed to do so would be liable under the statute. 1990 U.S.C.C.A.N. at 310, 399-404; 42 U.S.C. §§ 12183(a), 12188(a)(2); see *Long v. Coast Resorts, supra*, 267 F.3d. at 923. The rule is strict and demands strict compliance.[49]

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[49] *See Small v. Dellis*, 1997 U.S. Dist. LEXIS 23611, 17-19 (D. Md. Dec. 18, 1997) ("the Accessibility Guidelines for new construction demand strict compliance," citing 28 C.F.R. §

B. Plaintiff Has Standing Under *Lujan*.

An Article III injury-in-fact is a harm that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). (internal quotations omitted). A plaintiff must show that he or she "sustained or is immediately in danger of sustaining some direct injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, (1983) (internal quotations omitted). For Article III standing, under *Lujan*, a plaintiff need not show "imminent" injury if he or she has suffered "actual" injury. Under *Lyons*, he or she need not show "immediate" danger of injury, if there is "sustained" injury.

Only in cases where an injury has not yet occurred must a plaintiff prove an injury is "imminent." In "imminent injury" cases, a generalized unrealistic intent to return to the place of injury "some day" is insufficient. *Lujan*, 504 U.S. at 564. In *Lujan*, for example, one individual, an American, had visited Egypt, not seen a crocodile, and had a "hope to observe the crocodile directly" some day. The other had once visited Sri Lanka, did not observe the endangered species in which she was interested, and hoped some day to be "more fortunate in spotting at least the endangered elephant and leopard." *Lujan*, 504 U.S. at 563. *Lujan* held that there was no Article III standing. As Justice Kennedy put it, concurring, "this is not a

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36.406(a)), *aff'd*, 2000 U.S.App. LEXIS 7739 (4th Cir., Apr. 25, 2000) (unpublished).

case where it is reasonable to assume that the affiants will be using the sites on a regular basis."

In contrast, where individuals are injured by an ongoing violation or when they are deterred from encountering the continuing illegal conduct, there is Article III standing. In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-183 (2000), the Court held that when one intends to return to and use the polluted area, and is deterred from doing so, one has standing under *Lujan*. Thus, under *Laidlaw*, the intent to return does not need to meet the "concrete and particularized" test set forth in *Lujan*.

Only by ignoring *Laidlaw* and similar cases can Chipotle argue that there is a conflict with *Lujan*. *See Hohlbein v. Hospitality Ventures LLC*, 248 Fed. Appx. 804, 805 (9th Cir. 2007) (deterrence from visiting hotel lacking sufficient wheelchair-accessible rooms is sufficient for standing under *Laidlaw*).

Antoninetti had visited the two restaurants before and after he sued, lives quite close to one of them, and had been awarded damages by the district court for ADA violations occurring during his visits. There is no dispute that Antoninetti was repeatedly denied the "Chipotle Experience," extensively promoted by the restaurants, in violation of the ADA. There is no dispute that he wanted to return.[50] For prospective relief under the ADA, he need not

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[50] It is undisputed that Antoninetti intended to return to the restaurants if they were made accessible. The parties stipulated to Antoninetti's intent to return. Chipotle never previously argued that the Stipulation does not evidence the parties' agreement that he intended to return; therefore, it has waived that argument and cannot raise it now.

engage in the "futile gesture" of visiting a building containing known barriers that the owner has no intention of remedying, see 42 U.S.C. § 12188(a)(1). It is sufficient for standing that Antoninetti was excluded and intended to return "tomorrow" but for the deterrence of continued ADA violations. He needs only to "at least prove knowledge of the barriers and that they would visit the building in the imminent future but for those barriers." *Steger v. Franco, Inc.* 228 F.3d 889, 892 (8th Cir. 2000). (citation to *Laidlaw* omitted).

A wheelchair user who has been discriminated against by a fast food restaurant need not have a greater intention to return than Antoninetti here. Three cases are cited by Chipotle (Pet. at 29); none provide substantive support to its position; two of the cases actually support Antoninetti's standing.[51]

If Chipotle's view of standing were to be upheld, a person who enjoys a meal at McDonald's, Burger King, Arby's, Chipotle, or even a white tablecloth restaurant, could never litigate a Title III case

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[51] *Access for America, Inc. v. Associated Out-Door Clubs, Inc.*, 188 F.Appx. 818 (11th Cir. 2006) is an unpublished three-paragraph opinion, without discussion, simply upholding a district court's fact finding on "intent to return." In *Tandy v. City of Wichita*, 380 F.3d 1277, 1284-1285 (10th Cir. 2004), a Title II ADA tester's intent to use city buses "several times a year" was found to be "sufficiently impending to support standing to seek prospective relief." Similarly, the Eighth Circuit found that a blind plaintiff had standing to sue an office/retail building when – on his only visit -- he simply attempted to use a first floor restroom (he had been in the building's storefront coffee shop), but was unable to locate it. "He has not reentered the building since then." *Steger v. Franco, Inc.* 228 F.3d 889, 891-892 (8th Cir. 2000).

unless his or her next visit was penciled in on a calendar. That view is unreasonable.

C. The *Lujan* Issue Is Not Important.

Chipotle suggests that this case be heard because "across the country" plaintiffs are "using the threat of costly redesign injunctions to extract cash settlements" in frivolous cases of "ADA lawsuit abuse." Pet. at 30-31. This case does not involve any such situation.

In this case, Chipotle agreed at the outset that the removal of the wall was not a cost issue. This case was not abusive; both the court of appeals and the district court found that Chipotle violated the ADA and awarded damages.

Contrary to Chipotle's reading, the court of appeals did not "prohibit[ ] courts from considering serial-litigant status." Pet. at 30. Rather, the lower court agreed that courts "must therefore be 'particularly cautious' regarding 'credibility determinations that rely on a plaintiff's past [Disabilities Act] litigation." Pet. 2a. In any event, serial litigation is an accepted mechanism for securing one's civil rights.[52]

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[52] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (Fair Housing Act testers); *Kyles v. J.K. Guardian Sec. Servs.*, 222 F.3d 289, 299 (7th Cir. 2000) (discussing public interest advanced by testers; "The fact that testers have no interest in a job does not diminish the deterrent role they play by filing suit under Title VII."); *Tandy v. City of Wichita*, 380 F.3d 1277, 1284-1285 (10th Cir. 2004) (ADA Title II suit based on testers' experience with Wichita Transit's bus system); *Shaver v. Indep. Stave Co.*, 350 F.3d 716, 723-724 (8th Cir. 2003) (Civil rights tester litigation is protected. "Nothing in the words of the statute or in our cases, however, suggests that the

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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conduct of the aggrieved party, other than the party's initial protected activity, is relevant. Rather, the law focuses exclusively on the conduct of the alleged retaliator in determining whether the aggrieved plaintiff has a claim."). *Cf. Armstrong v. Turner Indus.*, 141 F.3d 554, 563-564 (5th Cir. 1998) (no standing where plaintiff job applicant in employment discrimination case has no "plans to seek employment with Turner again" and "does not assert any likelihood that he will be subjected to a similar violation in the future.").

APPENDIX

District Court Order of November 29, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MAURIZIO ANTONINETTI,
Plaintiff,

v. Case No. 05cv01660-J-WMC

CHIPOTLE MEXICAN GRILL,
Defendant.

ORDER RE NINTH CIRCUIT MANDATE AND OPINION

On November 16, 2010, a hearing took place before the Court regarding the Ninth Circuit's Mandate and Opinion in the above-captioned case. Pursuant to that Opinion, **the Court hereby orders the Clerk to enter judgment** against Defendant Chipotle for violation of the Americans with Disabilities Act.

On remand, three issues are now before the Court: (1) the scope of injunctive relief for this violation; (2) the amount of damages due to Plaintiff under the California Disabilities Act; and (3) the amount of attorney's fees due to Plaintiff's counsel under the Americans with Disabilities Act. Each issue will be addressed in turn.

I. Injunctive Relief

The Ninth Circuit held that Plaintiff's inability to view food preparation counters (counters containing the different foods that are available to Chipotle customers and on which the customers' individual orders are prepared) violated the Americans with Disabilities Act and remanded to the Court to determine the scope of injunctive relief necessary to remedy this violation. *Antoninetti v. Chipotle*, 08-55867, slip op. at 16017. At the November 16, 2010 hearing, Chipotle's counsel represented that Chipotle has lowered food preparation counters to a height where wheelchair-bound customers can view the counter without obstruction. This modification has been made at all Chipotle restaurants in California, including the two restaurants at issue in this case. Defendant argues that these actions render moot the need to issue an injunction.

Although Plaintiff does not dispute that lowering food preparation counters to a height suitable for wheelchair-bound customers would remedy the Disabilities Act violation at issue in this case, Plaintiff raises two concerns. First, Plaintiff has not yet received any evidence documenting these modifications. Second, Plaintiff argues that an injunction is still necessary to ensure that these modifications are made permanent.

The Court agrees that an order on this issue would be premature at this time. The Court requires a documentary record of modifications made to bring

the food preparation counter into compliance with the Americans with Disabilities Act. Moreover, for the Court to properly follow the Ninth Circuit opinion, an appropriate measure must be in place to ensure that Chipotle's food preparation counters remain permanently in compliance with this law. Because an injunction is not necessarily the only means to accomplish this goal, limited discovery and briefing on this issue are appropriate. Accordingly, the parties are to proceed as follows:

1. Defendant is to produce all evidence showing mootness by January 7, 2011;

2. The parties then have ninety days from service of Defendant's evidence of mootness to conduct discovery on this issue;

3. Plaintiff is to file a motion for summary judgment by April 22, 2011;

4. Defendant's response is due by May 6, 2011;

5. Plaintiff's reply is due by May 13, 2011.

All disputes regarding discovery on this issue or this briefing schedule are to be addressed to this Court.

II. Damages

At the hearing, Plaintiff's counsel represented

that Plaintiff is seeking $3,000 in additional damages under the California Disabilities Act for litigation related visits and that Plaintiff is not seeking additional damages for violations related to parking.

The Court hereby refers this issue to the Magistrate Judge for a settlement conference. If the parties cannot reach settlement on this issue, a litigation schedule will be entered by the Magistrate Judge. The Parties and their counsel shall appear before Magistrate Judge McCurine on January 12, 2011 at 2pm for a settlement conference. Judge McCurine may make any orders related this conference he deems appropriate.

III. Attorney's Fees

Plaintiff's counsel is entitled to attorney's fees greater than the $136,357.83 awarded for work performed in the original district court action. *See* slip op. at 16019. Because additional attorneys fees beyond this increased amount may be appropriate for work done after the Ninth Circuit issued its mandate, the Court, in the interest of judicial economy, will address attorney's fees after the other issues on remand are resolved.

IT IS SO ORDERED.

DATED: November 29, 2010

/s/
Honorable Barry Ted Moskowitz
United States District Judge